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SOL (MSHA) V. SUSQUEHANNA
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 1, 1994

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| SECRETARY OF LABOR | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. PENN 93-119 |
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| SUSQUEHANNA - MT. CARMEL, INC. | : | |

BEFORE: Jordan, Chairman; Backley, Doyle and Holen, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988). On November 22, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Susquehanna - Mt. Carmel, Inc. ("Susquehanna") for its failure to answer the Secretary of Labor's proposal for assessment of civil penalty or the judge's July 27, 1993, Order to Show Cause. The judge ordered the payment of civil penalties of \$4,400.

In a letter to the judge dated May 16, 1994, Joseph Rasmus requests that the default order against Susquehanna be set aside. Rasmus states that the Secretary does not oppose the operator's request. Rasmus does not offer an explanation for Susquehanna's failure to file an answer to the Secretary's penalty proposal or to respond to the judge's Order to Show Cause.

The judge's jurisdiction over this case terminated when his decision was issued on November 22, 1993. Commission Procedural Rule 69(b), 29 C.F.R.

2700.69(b)(1993). Under the Mine Act and the Commission's procedural rules relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. 823(d)(2); 29 C.F.R. 2700.70(a). Susquehanna did not file a timely petition for discretionary review within the 30-day period and the Commission did not sua sponte direct this case for review. Thus, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. 823(d)(1).

Relief from a final Commission judgment or order on the basis of inadvertence, mistake, surprise or excusable neglect is available to a party under Fed. R. Civ. P. 60(b)(1). 29 C.F.R. 2700.1(b)(Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable

Commission rules); Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991). It

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appears from the record that Susquehanna wishes to pursue its contest of the alleged violations.

In the interest of justice, we reopen this proceeding and deem Susquehanna's May 16 letter to be a request for relief from a final Commission decision incorporating a late-filed petition for discretionary review and excuse its late filing. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867, 1868-69 (December 1986). On the basis of the present record, however, we are unable to evaluate the merits of Susquehanna's position. We remand the matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990); Cougar Coal Company, Inc., 15 FMSHRC 967, 968 (June 1993).

For the reasons set forth above, we vacate the judge's default order, grant the petition for discretionary review, and remand for further proceedings.

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner